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No. 81-1581

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ANTONE OLIM, EDITH M. WILHELM, JOHN SMYTHE, WINTON LEONG, AND EDWIN SHIMODA, *Petitioners*,

v.

DELBERT KAAHUNUI WAKINEKONA, *Respondent*.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed February 22, 1982, Certiorari Granted June 1, 1982.

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*The following opinions, decisions, judgments, and orders have been omitted in printing this appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

Opinion of the U.S. Court of Appeals for the Ninth Circuit, dated May 26, 1981 ..... A-1

Order and Amendment of Opinion of the U.S. Court of Appeals for the Ninth Circuit, dated November 27, 1981 ..... B-1

Memorandum and Order of the U.S. District Court, District of Hawaii, dated June 8, 1978 ..... C-1

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

August 9, 1976	Complaint filed.
August 24, 1976	Answer filed.
October 6, 1976	First Amended Complaint filed.
October 26, 1976	Answer to First Amended Complaint filed.
June 8, 1978	Memorandum and Order—Plaintiff's First Amended Complaint Dismissed.
	Judgment on Decision by the Court.
June 30, 1978	Notice of Appeal filed.
May 26, 1981	Opinion of the U.S. Court of Appeals for the Ninth Circuit
July 8, 1981	Motion for Reconsideration and Suggestion for Rehearing *En Banc* or, Alternatively for a Stay Pending Certiorari
November 27, 1981	Order and Amended Opinion of the U.S. Court of Appeals for the Ninth Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CIVIL NO. 76-0286

DELBERT KAAHANUI WAKINEKONA,

Plaintiff,

v.

NELSON K. DOI, ANDREW I.T. CHANG, ANTONE OLIM, EDITH M. WILHELM, JOHN SMYTHE, LINTON LEON, and EDWIN SHIMODA,

Defendants.

FILED IN THE UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII
October 6, 1976

at 2 o'clock and 8 min. p.m.
WALTER A.Y.H. CHINN, CLERK
by Leslie L. Tau'a (Deputy)

FIRST AMENDED COMPLAINT

EXHIBITS "A," "B," "C" AND "D"

DEMAND FOR JURY TRIAL

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CERTIFICATE OF SERVICE ATTACHED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CIVIL NO. 76-0286

DELBERT KAAHANUI WAKINEKONA,
Plaintiff,

v.

NELSON K. DOI, ANDREW I.T. CHANG, ANTONE OLIM, EDITH M. WILHELM, JOHN SMYTHE, LINTON LEON, and EDWIN SHIMODA,
Defendants.

FIRST AMENDED COMPLAINT

I.

INTRODUCTION

1. This is an action brought by the Plaintiff above-named against certain State officials and employees, who did cause and/or conduct a hearing to be held whereby the Plaintiff was transferred from the Hawaii State Prison to a California penal institution known as Folsom State Prison. The action complained of herein is that the named defendants, under color of State law, did willfully, maliciously and recklessly cause and/or conduct the aforesaid hearing in such a manner so as to deny the Plaintiff his constitutional rights as provided in the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and did further violate certain Hawaii State laws, state regulations and Article I, Section 4 and 9 of the Hawaii State Constitution.

II.

JURISDICTION

2. Jurisdiction is conferred on this Court by 28 U.S.C. § 1331, 28 U.S. § 1343[3]. Plaintiff's right of action is based on 42 U.S.C. § 1983.

III.

PARTIES

3. Defendant NELSON K. DOI is an elected Lieutenant Governor of the State of Hawaii, by delegation of authority of the Governor of the State of Hawaii is generally supervising the management of Hawaii State Prison, and is an announced candidate for the office of Mayor of the City and County of Honolulu, State of Hawaii.

4. Defendant ANDREW I.T. CHANG is the appointed director of the Department of Social Services and Housing, State of Hawaii, and is responsible by statute for the supervision of the Hawaii State Prison.

5. Defendant ANTONE OLIM is the administrator of the Hawaii State Prison.

6. Defendants EDITH M. WILHELM, JOHN SMYTHE, LINTON LEON, and EDWIN SHIMODA are all employees of the Hawaii State Department of Social Services and Housing and did directly commit the actions complained of herein.

7. That the action complained of herein which were committed by the defendants WILHELM, SMYTHE, LEON, and SHIMODA were committed pursuant to the authority granted to said defendants by defendants, DOI, CHANG and OLIM and which were ratified by the defendants DOI, CHANG and OLIM and hence are their responsibility under the doctrine of Respondeat Superior.

IV.

FACTUAL ALLEGATIONS

8. That at all times mentioned herein, the Plaintiff was in the custody of the Corrections Division of the Hawaii State Department of Social Services and Housing being an inmate of the Hawaii State Prison confined to the maximum control unit therein.

9. That on August 2, 1976, the Plaintiff DELBERT KAAHANUI WAKINEKONA appeared before a board designated as a Program Committee of the Hawaii State Prison which included the defendants WILHELM, SMYTHE, LEON and SHIMODA for a hearing whose stated purpose was that of determining the reason for which the programs at the maximum control unit of the Hawaii State Prison had failed.

10. That on August 5, 1976, the Plaintiff was served with the written notice that he would have a further hearing to determine his program designation at Hawaii State Prison, which included a possible transfer to an out-of-state penal facility and that on said date Plaintiff was transferred to the correctional facility known as Halawa Correctional Facility.

11. That on August 10, 1976, a hearing was held on Plaintiff's program classification at Hawaii State Prison; that on August 11, 1976, the committee which consisted of the defendants WILHELM, SMYTHE, LEON and SHIMODA and which conducted the aforesaid hearing rendered its decision and a written copy thereof was served on Plaintiff on August 12, 1976.

12. That the decision of the aforementioned committee was that the Plaintiff should be transferred to a mainland facility. (See Exhibit "A," a xeroxed copy of said decision.)

13. That on August 13, 1976, the Plaintiff was transferred to the California correctional facility known as Folsom State Prison.

V.

FIRST CLAIM FOR RELIEF

14. That the decision of the defendants WILHELM, SMYTHE, LEON and SHIMODA was a malicious and willful violation of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and Article I Section 4 of the Hawaii State Constitution in that it was rendered by a board the composition of which was biased and

prejudicial against the Plaintiff and consisted of persons who were directly responsible for the initiation of said hearing which rendered the decision and whose specific intent and purpose was that of effectuating said transfer.

VI.

SECOND CLAIM FOR RELIEF

15. That the hearings on August 2, 1976 and August 10, 1976 were governed by state regulations promulgated and issued by the Corrections Division, Hawaii State Department of Social Services and Housing (see Exhibit "B," a xerox copy of said regulations attached hereto and incorporated herein).

16. That the transfer of the Plaintiff to the California State penal facility known as Folsom State Prison and the subsequent confinement of the Plaintiff in the "hole" at said facility was inconsistent hearing of August 10, 1976 as set forth in the aforesaid state regulations in that it was clearly punitive in design, purpose and intent, as is more fully shown by Exhibit "C" and "D," which are xerox copies of correspondence to Plaintiff's undersigned counsel and an attachment thereto.

VII.

THIRD CLAIM FOR RELIEF

17. That the actions taken by the defendants were a malicious and willful violation of state law, namely Chapter 353, Hawaii Revised Statutes.

WHEREFORE, the Appellant prays that this Honorable Court grant the following relief:

1. That a judgment issue declaring the actions complained of herein violate the Fifth, Eighth and Fourteenth Amendments of the United States Constitution, Article I, Section 4 and 9 of the Hawaii State Constitution, Chapter 353, Hawaii Revised Statutes and applicable state regulations.

2. That general damages be granted the Plaintiff against each of the named defendants, individually, in the sum of TEN THOUSAND DOLLARS ($10,000.00);

3. That punitive damages be granted the Plaintiff against each of the named defendants, individually, in the sum of TEN THOUSAND DOLLARS ($10,000.00);

4. Such further and other relief as this Court deems proper and appropriate.

DATED: Honolulu, Hawaii, September 16, 1976.

/s/ Clayton C. Ikei
CLAYTON C. IKEI
Attorney for Plaintiff

DEPARTMENT OF SOCIAL SERVICES AND HOUSING
Corrections Division

WAKINEKONA, Delbert K. — Name
576-42-7068 — Number

NOTICE OF PROGRAMMING

August 5, 1976 — Date
_____ — Time

You are herein informed that your correctional program is scheduled to be reviewed, evaluated, or established by the program committee/diagnostic team and you are to be present at HCF, 9:00 a.m. on the 10th of August 1976.

Reason for meeting:

To determine whether your classification within the Corrections Division should be changed. The Committee will consider your entire file, your changing needs, resources and facilities available to the Corrections Division, security of State facilities and personnel, and needs of the Other inmates. The Committee will consider whether you should remain at HSP, be transferred to another Hawaii facility or be transferred to a mainland state or Federal institution.

/s/ Edith M. Wilhelm
EDITH M. WILHELM
Administrator

Receipt of notice: Date: _____ Signature: _____
(Resident)

Received notice of hearing on 8/5/76 at 1:57 p.m. J. Smythe

Results of meeting: (Summary) The Program Committee, having reviewed your entire file, your testimony and arguments by your counsel, concluded that your control classification remains at Maximum. You are still considered a security risk in view of your escapes and subsequent convictions for serious

felonies. The Committee noted the progress you made in vocational training and your expressed desire to continue in this endeavor. However your relationship with staff, who reported that you threaten and intimidate them, raises grave concerns regarding your potential for further disruptive and violent behavior. Since there is no other Maximum security prison in Hawaii which can offer you the correctional programs you require and you cannot remain at MCU because of impending construction of a new facility, the Program Committee recommends your transfer to an institution on the mainland.

/s/ Edith M. Wilhelm 8/11/76
EDITH M. WILHELM
Program Commiittee Chairman

Receipt of results: Date: _____ Signature _____
(Resident)

Program Committee's recommendation is sustained.

/s/ Antone Olim
ANTONE OLIM
August 11, 1976

DEPARTMENT OF SOCIAL SERVICES AND HOUSING
STATE OF HAWAII

SUPPLEMENTARY RULES AND REGULATIONS
OF THE CORRECTIONS DIVISION

I

PROLOGUE

The following supplementary rules and regulations shall govern inmate/ward correspondence and the adjustment and classification processes within the Corrections Division of the State of Hawaii Department of Social Services and Housing. All prior Rules and Regulations governing the identical subject matters are null and void to the extent that they are inconsistent with these regulations.

II

CORRESPONDENCE

1. *INTRODUCTION:*

   Inmates/wards shall be afforded the privilege to send and receive letters to and from correspondents approved by the facility administrator.

2. *PRIVILEGED MAIL:*

   Privileged mail is that which is sealed and marked on the envelope as "confidential" and which may be inspected only for contraband in the presence of the inmate/ward. Letters to the Ombudsman may not be opened, but may be felt for contraband.

   a. Each inmate/ward may correspond via privileged mail with the following:

      1) the inmate/ward's sentencing judge;

      2) the inmate/ward's previously identified personal attorney;

      3) the Hawaii State Ombudsman;

4) the Governor of the State of Hawaii;

5) the Attorney General (State or Federal);

6) the Director, Department of Social Services and Housing;

7) the Corrections division Administrator;

8) the State of Hawaii Board of Paroles and Pardons;

9) the Facility Administrator; and

10) elected State of Hawaii officials.

b. Those inmate/wards committed under jurisdictions other than the State of Hawaii may, in addition, correspond, via privileged mail, with the following:

1) Chief executive of the foreign jurisdiction; and

2) Director of the department in foreign jurisdiction to which committed.

3. *INSPECTION:*

Incoming or outgoing mail to and from inmates/wards may be inspected and/or read pursuant to the following guidelines.

a. *Contraband.*

A facility administrator or a designated representative may inspect all incoming and outgoing mail to and from inmates/wards for the presence of contraband contained therein.

b. *Reading.*

The facility administrator or his designated representative may reject the mailing or receipt of letters pursuant to the following guidelines.

1) *Outgoing letters.* Outgoing letters from inmates/wards may be disapproved for mailing if the letter

is to a person who is not an approved correspondent or, upon reading, the letter concerns or contains any of the following:

(a) threats of physical harm against any person or threats of criminal activity;

(b) threats of blackmail or extortion;

(c) plans to send contraband in or out of the facility;

(d) plans to escape;

(e) plans for activities in violation of institutional rules;

(f) plans for criminal activity;

(g) is in code and its contents are not understood by the reader;

(h) solicits gifts of goods or money except as authorized.

(i) information which, if communicated, would create a clear and present danger of violence and/or physical harm to a human being;

(j) material which violates postal regulations; and/or

(k) conducting an inmate's/ward's business through the mails except as authorized.

2) 2) *Incoming letters.* Incoming letters to inmates/wards may be disapproved for receipt only: for the reasons set forth in 3b(1) above; if the letter contains material which would cause psychiatric or emotional disturbance to the inmate/ward; or if the letter is from a person who is not an approved correspondent and special permission for the letter has not been obtained.

3) *Limitations.* Disapproval of a letter on the basis that it would cause psychiatric or emotional disturbance to the inmate/ward may be done only by the facility administrator in consultation with a member of the facility's mental health or counseling staff. The letter may be disapproved only upon a finding that receipt of the letter would be likely to affect a prison discipline or security or the inmate's/ward's rehabilitation, and that there is no reasonable alternative means of ameliorating the disturbance to the inmate/ward. Outgoing or incoming letters may not be rejected solely upon the ground that they contain criticism of the institution or its personnel.

4) *Notice of Disapproval of Inmate Mail.*

(a) When an inmate/ward is probibited from sending a letter, the letter and a written and signed notice stating the reason(s) for disapproval and indicating the portions of the letter causing disapproval shall be given the inmate/ward.

(b) When an inmate/ward is prohibited from receiving a letter, the letter and a written and signed notice stating the reason(s) for disapproval and indicating the portion or portions of the letter causing disapproval will be given the sender. The inmate will be given notice in writing that a letter has been rejected, indicating the reason(s) and the sender's name.

(b) Copies of material from an inmate's/ward's correspondence which reveals evidence of past rule violations or contains any of the information set forth above in paragraph 3b(1) above may be placed in his file. He shall be notified in writing of the placing of any such material in his file.

5) *Use of English Language.* All letters should be written in English, but every effort should be made to accommodate those inmates/wards who are unable to write in English or whose correspondence would be unable to understand a letter written in English. The criminal sophistication of the inmate/ward and the relationship of the inmate/ward and the correspondent are factors to be considered in deciding whether correspondence in a foreign language should be permitted.

c. *Censorship.*

A facility administrator or a designated respresentative may censor incoming or outgoing mail to or from inmates/wards, subject to the following two criteria. First, censorship must further a substantial governmental interest, such as maintaining the security and order of the facility, rehabilitating the inmate/ward, or ensuring safety of facility personnel, residents, and/or the general community. Second, the facility will censor no more of the letter than necessary or essential to achieve the particular governmental interest. Thus, for example, plans for criminal activities, escape, movement of contraband, and the like may be censored, but not other unobjectionable material unrelated to the particular governmental interest. Copies of the censored material shall be placed in the inmate's/ward's file. He shall be notified in writing of the placing of any such material in his file.

III

THE ADJUSTMENT PROCESS

1. *GENERAL:*

The Adjustment process tailors punishment for specific rule violations to the individual's training and treatment needs while maintaining facility order and ensuring respect for rules and the rights of others.

a. *Minor Misconduct.* A minor rule violation is defined as that which poses no threat to the safety, security, or welfare of the staff, other inmates/wards, or the institution and/or subjects the individual to the imposition of lesser penalties, such as a reprimand or the mere loss of privileges. Such misconduct may be punished by a disciplinary hearing officer designated by the facility administrator who was not actively involved in the process by which the inmate/ward was brought before him. The disciplinary hearing officer shall inform the inmate/ward that he committed a minor infraction, to which the individual must be given a brief opportunity to respond, to offer an explanation or defense on his behalf, or otherwise show that he is not deserving of disciplinary action. The disciplinary hearing officer shall thereafter prepare a brief written report to be given to the individual and placed in his file, indicating the infraction, the sanction, and the date(s) the sanction is to be or was carried out.

b. *Serious Misconduct.* A serious rule violation is defined as that which poses a threat to the safety, security, or welfare of the staff, other inmates/wards, or the institution and/or subjects the individual to the imposition of serious penalties, such as segregation. Such misconduct will be punished through the Adjustment Committee pursuant to the procedures set forth below.

2. *COMPOSITION:*

The facility administrator shall establish an impartial Adjustment Committee composed of at least three members who were not actively involved in the process by which the inmate/ward was brought before the Committee. The facility administrator shall not sit as a member of the Committee. The Adjustment Committee has the power to punish for misconduct.

3. *PROCEDURE:*

a. *Pre-hearing detention.* An inmate/ward should not be detained pending an Adjustment Committee hearing longer than three working days; provided, however, if, in the judgment of the facility administrator, conditions exist which require longer detention, he may be so detained for a reasonable time. The guidelines set forth for emergency detention should be followed.

b. *Pre-hearing investigation.* A staff member should conduct a complete investigation into the facts of the alleged misconduct to determine if there is probable cause to believe the inmate/ward committed misconduct. If he determines probable cause exists, the following procedures shall be initiated.

c. *Notice.* The inmate/ward has the right to prior notice that an Adjustment Committee hearing will be held against him.

(1) Within a reasonable time, not less than 24 hours prior to the hearing, the charged inmate/ward shall be served with written notice of the time and place of the Adjustment Committee hearing and what the specific charges, including a brief statement of the facts, are against him. If the inmate/ward waives the 24 hour period, it shall be reduced to writing and signed by the inmate/ward on the face of the notice.

(2) The inmate/ward and/or his counsel substitute (as described below) shall have the opportunity to review all relevant non-confidential reports of misconduct or a summary of the details thereof during the period between the notice and the hearing.

(3) The misconduct report or summary should briefly contain the following: the specific rule violated; the facts supporting the charge; any unusual

inmate/ward behavior; any staff or inmate/ward witnesses; the disposition of any physical evidence (e.g., weapons); and any immediate action taken.

d. *Hearing.* The inmate/ward has a right to appear at the Adjustment Committee hearing, except where institutional safety would be jeopardized. Exclusion of the individual from the hearing shall occur only in exceptional circumstances and shall be well documented. If the inmate/ward declines to attend the hearing, it shall be held regardless of his absence.

(1) The Committee shall explain the reason for the hearing and the nature of the charge(s) against the inmate/ward. The inmate/ward shall plead guilty or not guilty to the charges. Failure to plead shall be accepted as a plea of not guilty.

(a) A plea of guilty eliminates the need to present evidence against the inmate/ward who will then be given an opportunity to explain his actions and/or offer evidence in mitigation.

(b) A plea of not guilty necessitates the presentation of evidence against the inmate/ward.

(2) Evidence, such as testimony and reports, shall be presented to the Committee in the presence of the charged inmate/ward. The inmate/ward should be advised that he has a right to remain silent, but that his silence may be used as a permissable inference of guilt.

(3) *Confrontation and cross-examination:*

(a) The inmate/ward may be given the privilege to confront and cross-examine adverse witnesses.

(b) However, the Committee may deny confrontation and cross-examination and identification of adverse witnesses if in its adjustment to do so would:

(i) subject the witnesses to potential reprisal;

(ii) jeopardize the security and/or good government of the facility; or

(iii) be otherwise unduly hazardous to the facility's safety or correctional goals.

(c) If confrontation and cross-examination and identification of adverse witnesses are denied, the Committee may, but is not required to, enter in the record of the proceeding and make available to the inmate/ward an explanation for the denial. Additionally, the inmate/ward shall be given an oral or written summary of the testimony against him and provided an opportunity to respond.

(4) *Opportunity to be heard:* The inmate/ward shall be given an opportunity to respond to any and all evidence against him, explain his alleged misconduct, and/or offer evidence of mitigation.

(a) He should be permitted to call witnesses and present evidence in his defense so long as it will not be unduly hazardous to institutional safety or correctional goals.

(b) The Committee may deny the inmate's/ward's calling of certain witnesses or presentation of certain evidence for reasons such as: irrelevance; lack of necessity; the hazards presented in individual cases; or any other justifiable reason. In this regard,

the Committee retains the the discretion to keep the hearing within reasonable limits and refuse the presentation of evidence or the calling of witnesses, keeping in mind the right of the inmate/ward to be heard. The Committee is encouraged, but is not required, to state the reason(s) for the refusal.

(5) *Counsel substitute:* No inmate/ward shall be represented by an attorney at the Adjustment Committee hearing. He will be permitted to employ counsel-substitute. Counsel-substitute shall constitute a member of the facility staff who did not actively participate in the process by which the individual was brought before the Committee or, in the facility administrator's discretion, a sufficiently competent inmate designated by the facility staff.

e. *Findings.* The inmate/ward has a right to be apprised of the findings of the Adjustment Committee.

(1) Upon completion of the hearing, the Committee may take the matter under advisement and will render a decision based upon evidence presented at the hearing to which the individual had an opportunity to respond to any evidence which may be subsequently come to light after the formal hearing. The inmate/ward's silence may be used as a permissable inference of guilt, although disciplinary action must be based upon more than his mere silence. Disciplinary action may only be rendered where:

(a) the inmate/ward admits the violation or pleads guilty;

(b) the charge is supported by substantial evidence; and/or

(c) there is reasonable cause to believe that the inmate's/ward's behavior has constituted a danger to person, property, security, or the orderly operation of the facility.

(2) The inmate/ward shall be given a brief summary of the Committee's findings within a reasonable period of time after the hearing, which findings shall be entered in his file. The findings will briefly set forth the evidence relied upon and the reasons for the action taken. The findings may properly exclude certain items of evidence if necessitated by personal or institutional safety and goals; the fact that evidence has been omitted and the reason(s) therefore must be set forth in the findings.

f. *Punishment.* The Adjustment Committee has the power to render sanctions commensurate with the gravity of the rule and the severity of the violation. Corporal punishment is prohibited provided, however, that physical force may be employed for self-defense or defense of others, to maintain the immediate order and security of the prison, to remove an inmate pursuant to a lawful order, or any other reason demanded by the exigencies of institutional safety and correctional goals. The following types of punishment may be rendered by the Adjustment Committee:

(1) temporary or permanent loss of privileges;

(2) segregation or confinement not longer than 60 days provided, however, that a longer period may be imposed with the express written approval of the Corrections Division Administration; and

(3) any other punishment deemed necessary by the Adjustment Committee.

The Committee may also refer the matter to the Prison Program Committee for further action.

4. *REVIEW:*

Each inmate/ward has the right to seek administrative review of the decision of the disciplinary hearing officer or adjustment committee through the grievance process. Review shall be initiated within fourteen calendar days of receipt of the Committee's decision.

IV

THE CLASSIFICATION PROCESS

1. *GENERAL:*

An inmate's/ward's classification determines where he is best situated within the Corrections Division. Rather than being concerned with isolated aspects of the individual or punishment (as is the adjustment process), classification is a dynamic process which considers the individual, his history, his changing needs, the resources and facilities available to the Corrections Division, the other inmates/wards, the exigencies of the community, and any other relevant factors. It never inflicts punishment; on the contrary, even the imposition of a stricter classification is intended to be in the best interests of the individual, the State, and the community. In short, classification is a continuing evaluation of each individual to ensure that he is given the optimum placement within the Corrections Division.

2. *COMPOSITION:*

The facility administrator shall establish an impartial Program Committee composed of at least three members who were not actively involved in the process by which the inmate/ward was brought before the Committee. The facility administrator shall not sit as a member of the Committee.

3. *PROCEDURE:*

So long as a transfer involves a grevious loss to the inmate/ward, the following procedures adhere. Grievous loss is generally defined as a serious loss to a reasonable man. Thus, transfer from Hawaii State Prison to Kulani Honor Camp would normally not cause a grievous loss.

a. *Pre-hearing detention.* An inmate/ward should not be detained pending hearing longer than four working days, except where emergency conditions require a longer period of detention which shall be a reasonable time.

b. *Notice.* The inmate/ward has the right to prior notice that a Program Committee hearing will be held involving him.

(1) Within a reasonable time, not less than 24 hours prior to the hearing, the inmate/ward shall be served with written notice of the time and place of the Program Committee hearing and what the Committee will consider at the hearing. The notice should briefly state what the classification process involves, that it considers everything in his file, and any recent specific facts which may weigh significantly in the classification process. If the inmate/ward waives the 24 hour period, it shall be reduced to writing and signed by the inmate/ward on the face of the notice.

(2) The inmate/ward and/or his counsel substitute (as described below) shall have the opportunity to review all relevant nonconfidential information, that may be considered by the Committee, during the period between the notice and the hearing.

c. *Hearing.* The inmate/ward has a right to appear during the Program Committee hearing if a change, modification, or transfer is planned which would result

in a grievous loss. If the inmate/ward declines to attend the hearing, it shall be held regardless of his absence.

(1) The Committee shall explain the nature of the classification process and generally what the Committee is considering at the hearing.

(2) Evidence shall be presented to the Committee in the presence of the inmate/ward. The inmate/ward should be advised that he has a right to remain silent, but that his silence may be used as a permissible inference of evidence against him.

(3) *Confrontation and cross-examination*:

(a) The inmate/ward may be given the privilege to confront and cross-examine adverse witnesses.

(b) However, the Committee may deny confrontation and cross-examination and identification of adverse witnesses if in its judgment to do so would:

(i) subject the witness(es) to potential reprisal;

(ii) jeopardize the security and/or good government of the facility; or

(iii) be otherwise unduly hazardous to the facility's safety or correctional goals.

(c) If confrontation and cross-examination and identification of adverse witnesses are denied, the Committee may, but is not required to, enter in the record of the proceeding and make available to the inmate/ward an explanation for the denial. Additionally, the inmate/ward shall be given an oral or written summary of the testimony against him and provided an opportunity to respond.

(4) *Opportunity to be heard*: The inmate/ward shall be given an opportunity to respond to any and all evidence and offer evidence on his behalf.

(a) He should be permitted to call witnesses and present evidence on his behalf so long as it will not be unduly hazardous to institutional safety or correctional goals.

(b) The Committee may deny the inmate's/ward's calling of certain witnesses or presentation of certain evidence for reasons such as: irrelevance; lack of necessity; the hazards presented in individual cases; or any other justifiable reason. In this regard, the Committee retains the discretion to keep the hearing within reasonable limits and refuse the presentation of evidence or the calling of witnesses, keeping in mind the right of the inmate/ward to be heard. The Committee is encouraged, but is not required, to state the reason(s) for the refusal.

(5) *Counsel substitute*: No inmate/ward shall be represented by an attorney at the Program Committee hearing. He will be permitted to employ counsel-substitute which shall constitute a member of the facility staff who did not actively participate in the process by which the individual was brought before the Committee or, in the facility administrator's discretion, a sufficiently competent inmate designated by the facility staff.

d. *Findings*. The inmate/ward has a right to be apprised of the findings of the Program Committee.

(1) Upon completion of the hearing, the Committee may take the matter under advisement and will render a recommendation based only upon evidence presented at the hearing to which the indi-

vidual had an opportunity to respond or any evidence which may subsequently come to light after the formal hearing. The inmate/ward's silence may be used as a permissible inference of evidence against him, although reprogramming must be based upon more than his mere silence.

(2) The inmate/ward shall be given a brief written summary of the Committee's findings within a reasonable period of time after the hearing, which findings shall be entered in his file. The findings will briefly set forth the evidence relied upon and the reasons for the action taken. The findings may properly exclude certain items of evidence if necessitated by personal or institutional safety and goals; the fact that evidence has been omitted and the reason(s) therefore must be set forth in the findings.

(3) The facility administrator will, within a reasonable period of time, review the Program Committee's recommendation. He may, as the final decisionmaker:

(a) Affirm or reverse, in whole or part, the recommendation; or

(b) hold in abeyance any action he believes jeopardizes the safety, security, or welfare of the staff, inmate/ward, other inmates/wards, institution, or community and refer the matter back to the Program Committee for further study and recommendation.

4. *REVIEW:*

Each inmate/ward has the right to seek administrative review of the decision through the grievance process. Review shall be initiated within fourteen calendar days of receipt of the final decision.

V

LEGAL COUNSEL

Notwithstanding the foregoing Supplementary Rules and Regulations, an inmate/ward may retain legal counsel only in the following specific situations:

1. Classification Process:
   a. For a potential Interstate transfer.
   b. For a potential transfer to an increased security classification longer than 30 days.
2. Adjustment Process:
   a. For a potential segregated punishment longer than 30 days.
   b. For any rule violation which also constitutes a criminal felony.

Effective date: These supplementary rules and regulations shall become effective ten days after filing in the Office of the Lieutenant Governor of the State of Hawaii.

Adopted:

/s/ Andrew I.T. Chang
ANDREW I.T. CHANG
Director, Department of Social Services and Housing.

APPROVED AS TO FORM:

/s/ Michael A. Lilly
MICHAEL A. LILLY
Deputy Attorney General

Date: June 10, 1976

APPROVED:

/s/ George R. Ariyoshi
GEORGE R. ARIYOSHI
Governor, State of Hawaii

Date: June 15, 1976

EXHIBIT C

Name: D. Wakinekona B-75902X
Box No.: Reprisa, California
Date: August 16, 19__

Gil & Clayton

This is just a short note to let you, both know I'm at Folsom Prison, and right at this moment I'm in th hole!!! I just got through facing a committee a few minutes ago to see if I should go to the main yard, but there decision (wrong) was that I should remain in the hole just as I was back there in Hawaii, except in here we take a bath on Wensdays and Sunday, what system this place has, so far no programs and Hawaii say's that I'll have so

All it seems to me that I was taken out of one hole or unit and put into another one!! a bigger one though.

I hope something can be done so cause I miss Haw and my family!!

In this letter is a peice of paper which I was given on the night I arrived, it seems Hawaii made me out to be a bad guy. Maybe I'm wrong. ren isn't here with me he must be at San Quenten

Delbert

P.S.
When writing to me use may name and new number as you see it on the envelope or else I won't get the mail.

P.S.S. Send me stamps

EXHIBIT D

NAME and NUMBER WAKINEKONA B-75902X CELL: SHU 23

above named inmate arrived this date from Hawaii prison system. Placed in the Security Housing unit pursuant to memo from J. Osmpoy, AWC, which reads as follows: "On Friday August 13th at approximately 8:00 pm inmate Kakinelsona will arrive at Folsom vin CDC transportation./This inmate is from the Hawaii prison system and will be on safekeeper status at Folsom. He has been convicted of murder 1st and is serving a sentence of life without possibiliyt of parole and, for two counts of armed robbery. This inmate is on lockup status in the Hawaii prison system. He has a background of aggravated battery and has a history of escape from prison. He is considered to be the most dangerous and assaultive inmate in the Hawaii prison system. He is to be kept separated from inmate Kashanni, who should arrive tomorrow, also from the Hawaii system, as much as possible. . . ."

IG: Central File via H. Morphis, AWC/t
CO Mr. Petrocci
AWC File
Inmate/Undersigned
August 13, 1976

/s/ F. J. Gaul, Lieutenant
F. J. GAUL
3rd Watch

CLASS. and SOC. SERV.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CIVIL NO. 76-0286

DELBERT KAAHANUI WAKINEKONA,

Plaintiff,

v.

NELSON K. DOI, ANDREW I.T. CHANG, ANTONE OLIM, EDITH M. WILHELM, JOHN SMYTHE, LINTON LEON, and EDWIN SHIMODA,

Defendants.

DEMAND FOR JURY TRIAL

The Plaintiff hereby demands a trial by jury on all issues so triable herein.

DATED: Honolulu, Hawaii, September 16, 1976.

/s/ Clayton C. Ikei
CLAYTON C. IKEI
Attorney for Plaintiff

CERTIFICATE OF SERVICE

The undersigned does hereby certify that he delivered upon MICHAEL A. LILLY, ESQ., Attorney for Defendants, at his last known address, the enclosed documents on October 6, 1976.

/s/ Clayton C. Ikei
CLAYTON C. IKEI
Attorney for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil Action File No. 76-0286

DELBERT KAAHANUI WAKINEKONA,

v.

ANTONE OLIM, EDITH M. WILHELM, JOHN SMYTHE, WINTON LEONG and EDWIN SHIMODA.

JUDGMENT

This action came on for (hearing) before the Court, Honorable DICK YIN WONG, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the plaintiff's First Amended Complaint is hereby DISMISSED.

Filed In The
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII
June 8, 1978

at 4 o'clock and 30 min. p.m.
WALTER A.Y.H. CHINN, CLERK
by L. C. CACHERN (Deputy)

Dated at Honolulu, Hawaii this 8th day of June 1978.

WALTER A.Y.H. CHINN
Clerk of Court

by L. C. Cachern
Clerk

UNITED STATES COURT OF APPEALS
For The Ninth Circuit

No. 78-3092
DC CV 76-0286 DYW

DELBERT KAAHANUI WAKINEKONA,
Plaintiff-Appellant,

v.

ANTONE OLIM, EDITH M. WILHELM, JOHN SMYTHE, WINTON LEONG and EDWIN SHIMODA.
Defendants-Appellees.

Filed In The
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII
December 14, 1981
at 9 o'clock and 15 min. a.m.
WALTER A.Y.H. CHINN, Clerk

APPEAL from the United States District Court for the District of Hawaii.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Hawaii and was duly submitted.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is REVERSED AND REMANDED.

A TRUE COPY
ATTEST December 8, 1981
Clerk of Court
by: _____ (Deputy Clerk)

Filed and entered May 26, 1981